only serves to expand the already bloated arsenal of the unscrupulous criminal determined to manipulate the system.

Hunt, supra at 1239 (quoting *Commonwealth v. Corbin*, 568 A.2d 635,

638-639) (Pa.Super: 1990)) (emphasis added).

Analyzing the excusable delay in the present case, we note the following. While the Commonwealth's efforts to arrest Appellees cannot be characterized as diligent, its conduct following their arrest differed significantly. First, the record establishes unequivocally that the preliminary hearing was delayed until March 19, 2003, through no fault of the Commonwealth. District Justice Lindemuth testified that it was standard practice to postpone a preliminary hearing when there was a conflict in representation, as in the present case, and the Commonwealth certainly cannot be blamed for the fact that Appellees all sought representation

through the public defender's office with only two obtaining outside counsel prior to the preliminary hearing. The record indicates the following:

Q. And could you tell us if you recall the events of that morning regarding the hearing, or the continuance thereof?

A. I had had some indication, but nothing in writing that there possibly could be a conflict prior to that day with the PD's Office, but we had nothing in writing and so we - the hearings went on as scheduled. The District Attorney's Office came to me and said we have a conflict with the PD's office, there are two from the PD's office and I think we need a continuance.

Q. Okay. Now, what is the common procedure for situations in which conflicts exists in Warren County?

A. We have always normally in the past have always granted those because if they go on at that time and the person has no attorney and it goes on and they're not represented,

which that person would not have been represented by an attorney on that date, then it is remanded back to the preliminary hearing stage by the judge because there was - the defendant was not represented.

Q. All right. So it's your normal procedure where there is a conflict to do what?

A. To continue it until they do get counsel.

N.T., 6/20/03, at 95. District Justice Lindemuth also confirmed that March 19, 2003, was the next available date. Id. at 96-97.

Thus, the preliminary hearing could not proceed as scheduled because two defendants were represented by the public defender's office. Furthermore, once the preliminary hearing was held, the exhibits submitted by the Commonwealth established unequivocally that each ensuing court date was scheduled on the next available open date on the court calendar and that the scheduling procedure was mandated by the applicable local rules.

Thus, the defendants were all either arrested or relinquished themselves to authorities in early December. The preliminary hearing was delayed by circumstances beyond the Commonwealth's control as was the trial date. This excusable delay amounted to six months, and the trial was scheduled forty-seven days after the mechanical rundate. As noted, due diligence does not require perfect vigilance but reasonable effort. Perfect diligence prior to December 2002 is not present in this case but the reasons for the delay beyond December 2002 cannot be placed at the door of the Commonwealth.

In weighing society's interests in the present case against Appellees' right to a speedy trial, the following factors are pertinent. The record herein evidences no misconduct by the Commonwealth, and no attempt to evade the mandate of Rule 600. Furthermore, there was minimal delay in the scheduling of trial-just over six weeks. We have recognized that the unavailability of a Commonwealth witness, while not excludable, can warrant an extension under Rule 600. *Commonwealth v. Corbin*, 568 A.2d

635 (Pa.Super. 1990) (where witness became unavailable for reason not within Commonwealth's control, extension of time under Rule 600 was warranted).

In *Commonwealth v. Hill, supra,* the Supreme Court analyzed two separate Rule 600 cases, and its decision involving defendant Cornell is analogous to the ones presented herein. Cornell's motion to dismiss under Rule 600 was granted over 114 days after his rundate, which is more than twice the period at issue in this case. The Court noted that there were numerous pretrial proceedings involved in the case, including the preliminary hearing, the arraignment, and the hearings to consider the defendant's pretrial motions and that the Commonwealth attended and was prepared for each of these proceedings. Even though Cornell's Rule 600 dismissal motion had been granted well beyond his Rule 600 rundate, the Supreme Court affirmed this Court's reversal of the trial court's decision to dismiss the case. It concluded that the Commonwealth was diligent in prosecuting the action based on its readiness to proceed at the scheduled hearings and the fact that the trial was delayed for reasons not under the control of the Commonwealth.

Such is the case herein. The Commonwealth was present and prepared to proceed at the preliminary hearing but could not. It scheduled this matter as soon as possible given the constraints of the court's schedule. There was a mere forty-seven day delay in the trial beyond the rundate.

We also are mindful of our Supreme Court's pronouncement in *Commonwealth v. Spence,* 534 Pa. 233, 244, 627 A.2d 1176, 1181 (1993), where the Court observed that a two-step process is used to analyze alleged violations of Rule [600] : (1) whether the delay itself was sufficiently long to be "presumptively prejudicial"; and, if so, (2) whether the delay is justified under the balancing test of *Barker v. Wingo,* 407 U.S. 514 (1972). The balancing test analyzes four factors: the length of the delay; the reason for the delay; the defendant's assertion of the right to a speedy trial; and, any prejudice to the defendant arising from the delay.

In *Spence*, the Court concluded that a three week delay past the rundate did not present a Rule 600 violation because the delay did not prejudice the defendant. Noting the judicial congestion and the need to coordinate the schedules of the four co-defendants for joint trial, the Court ruled, "the Commonwealth exercised due diligence because the circumstances occasioning the postponement were beyond the control of the Commonwealth and the judicial delay was not unreasonable." Id. at 245, 627 A.2d at 1182.

Herein, the same factors interplay. The length of the delay, fortyseven days, was not significant enough to be presumptively prejudicial.[9] Even if it were, under the Barker analysis, the delay was reasonable under its four-part test. The delay was caused by the Commonwealth's need to coordinate trial for six defendants and twenty-seven burglaries and due to the fact that it was working within the constraints of the limited judicial resources of a small county, which could not schedule criminal matters daily. Finally, Appellees fail to assert the existence of prejudice. Thus, as outlined in Spence, the Commonwealth exercised due diligence because the reason these matters were scheduled beyond the rundate were not within its control and the judicial delay was not unreasonable:

The trial court and Appellees rely heavily upon Aaron, supra. However, in that case, the trial in the matter was scheduled over three months after the mechanical rundate, and the record failed to indicate that the Commonwealth made any effort to bring the defendant to trial within the Rule 600 period.

Considering the excusable delay at issue in this case and the fact that the delays after December 2002 were not the fault of the Commonwealth, we conclude that the trial court abused its discretion in dismissing these cases.

Orders reversed. Cases remanded. Jurisdiction relinquished.

Judgment Entered:

Deputy Prothonotary DATE: January 21, 2005

[9] Appellee Keefer's trial, as seen, Supra was delayed a mere twenty four days, which was deemed a minimal delay in Spence, and did not serve as a basis for a Rule 600 dismissal, particularly in light of the judicial delay.

IN THE COURT OF COMMON PLEAS
OF THE 37th JUDICIAL DISTRICT OF PENNSYLVANIA
WARREN COUNTY BRANCH
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

Vs.
Cr. 172 of 2003
JEREMIAH LEE IRWIN

MEMORANDUM OPINION
IN RESPONSE TO CONCISE STATEMENT
OF MATTERS RAISED ON APPEAL

AND NOW, this 9th day of October, 2003, this Court having filed an Order pursuant to Pa. R.A.P. 1925(b) on August 26, 2003 directing Defendant to "file of record and serve on the trial court a concise statement of the matters complained of on the appeal" and Defendant having served the Court with a response on September 9, 2003, it is respectfully suggested that the Superior Court consider the Memorandum Opinion of this Court of June 27, 2003 in addition to this supplementary opinion.

The Superior Court's standard of review of a trial court decision on Rule 600 issues is whether or not the trial court abused its discretion and in making that determination, the Superior Court is limited to the evidence on the record of the Rule 600 evidentiary hearing and the findings of the trial court. *Comm. v. Aaron*, 804 A.2d 39 (Pa. Super 2002). In reviewing the trial court's ruling, the appellate court views the facts in a light "most favorable to the prevailing party." *Id.* at 42.

In the Commonwealth's Concise Statement of Matters Complained of on Appeal under Paragraph (B)(a) and (b), the Commonwealth refers to the period of time between the filing

of the charges in a written complaint against the Defendant and the date on which the Defendant was apprehended. The Commonwealth argues that because Trooper Neiswonger called the Monaca Police Department and because he entered the Defendant's name on the NCIC data base, the Trooper had acted with due diligence. Pennsylvania Rule of Criminal Procedure 600 is very clear in its guidelines as to the period of time to be excluded between the filing of the complaint and the apprehension.

In determining the period for commencement of trial, there shall be excluded therefrom:

1. The period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence; . . ."

Pa. R.Cr.P. 600(C)

At the Rule 600 hearing in this matter, Trooper Neiswonger admitted that he knew Defendant Irwin's address from the moment that the Complaint was first filed (Tr. at 14-15) but that he never made any attempt to look for Defendant Irwin. He also did not ask the Monaca, Pennsylvania police to look for Defendant Irwin when he talked to them in regard to Defendant Anzio. (Tr. at 23: 20) Without the Trooper conducting any search nor any inquiry in regard to this Defendant, whose address was known, except for placing his name on the NCIC list and telling the Monaca police he had a warrant, the Defendant eventually was picked up by the Monaca Police on November 20, 2002. (Tr. at 10:17) On July 12, 2002, the Trooper also attempted one telephone call to Defendant Irwin. (Tr. at 14:11-15) This Court, in its research, can locate no reported case in which the Commonwealth was held to have exercised due diligence when the Commonwealth made no attempt whatsoever to locate a defendant whose address was known except to enter the defendant into the NCIC system and inform a police department in his area of residence that a warrant was in place. In

all reported cases, the officer makes at least a minimal effort to go to the defendant's address and to make inquiries of relatives, neighbors, postal authorities or police agencies in the defendant's place of residence. Therefore, the period of time from the filing of the criminal complaint on May 28, 2002 to December 6, 2002 cannot be excluded from the computation of 365 days.

It must be noted that although the Commonwealth in its Concise Statement of Matters Complained of on Appeal, under Paragraph B(a) states that "Trooper Neiswonger attempted to locate the defendants by calling the Monaca Police Department and inquiring about the location of each defendant," the testimony does not back up the Commonwealth's assertion. In response to leading questions by the District Attorney, The Trooper stated that when he called the Monaca Police, he advised them that he was looking for "these individuals" (Tr. at 9:19) and that there were warrants out for all of the defendants and that he then made a request for the police to look for the defendants. However, on cross examination, Trooper Neiswonger admitted that he had asked the Monaca Police to go to only one of the defendant's residences, that is Defendant Anzio. Also, Trooper Neiswonger later stated that he was not sure that he had even mentioned the other defendants to the Monaca Police, but instead stated, "I believe I told them all the people that I was looking for to see if they were familiar with them, as far as I can remember," (Tr. at 21:21) and "I'm pretty sure I asked them about Mr. Irwin, Mr. Keefer. The two girls I'm not positive on." (Tr. at 22:3) After the Monaca Police had attempted to go to the Anzio residence, Trooper Neiswonger talked to them again on the phone. At the hearing, in response to a question from Elizabeth Ziegler, Esquire, attorney for Defendant Keefer, as to whether he asked the Monaca Police "to do anything further in regard to the other defendant's houses they had not gone to," he answered, "Not that I remember." (Tr. at 23:17) In examining the testimony of Trooper Neiswonger, one finds that he had only stated to the Monaca Police, that *perhaps*, he had warrants for the other defendants and that *perhaps* he had asked the Monaca Police

to look for them, but that he did not make any actual inquiries about the location of any defendant other than Defendant Anzio. A review of Trooper Neiswonger's testimony in light of the Court's obligation to view the evidence in a light most favorable to the prevailing party, dictates a finding of a lack of due diligence in the Commonwealth's actions from May 28, 2002 to December 6, 2002.

In the Commonwealth's Concise Statement of Matters Complained of on Appeal, Paragraph B(c), it is alleged that the trial court should have excluded a period from December 4, 2002 when Defendant Irwin was scheduled for his first preliminary hearing to January 27, 2003, the first continued date for his hearing. At the Rule 600 hearing, District Justice Cynthia Lindemuth testified that the continuance from December 4, was not at the request of the Defendant. According to her documents, the continuance was done on her own behalf because of the consolidation of the cases. (Tr. at 98:11-18) The delay not having been requested by the Defendant and being an action of the Court, the interim period between the two scheduled preliminary hearings is not excluded. *See Aaron*, 804 A.2d 39.

At the Rule 600 hearing, Assistant District Attorney Elizabeth Feronti testified that the first preliminary Hearing in this matter was scheduled for January 27, 2003 (Tr. at 36:18). (This was the consolidated preliminary hearing and does not refer to the first scheduled hearing for Defendant Irwin which was to be on December 4, 2002.) In its Concise Statement of Matters Complained of on Appeal in Paragraph B(e), the Commonwealth alleges error on the part of the Court in failing to appoint stand-by counsel for a preliminary hearing. There is no testimony that the Warren County Public Defender's Office has a sufficient number of attorneys employed so as to be able to assign attorneys to stand by at preliminary hearings on the slight chance that one may be needed. The record shows that at the time that the first preliminary hearing was scheduled, each defendant had an attorney appointed to represent him/her. The conflict of interest became evident

only later when the Court-appointed individual defense counsel for Defendant Keefer became employed in the Public Defender's office and attended the hearing without being aware that the conflict could create a problem in that a Public Defender, Mark Turbessi, Esquire, was representing Defendant Irwin. (Tr. at 37-38) Elizabeth Feronti, the Assistant District Attorney representing the Commonwealth at the preliminary hearing, is rather sure that she did not suggest that Defendant Keefer proceed without counsel or that he waive the conflict and permit Attorney Bonavita to represent him. (Tr. at 88-89) Attorney Bonavita was present and prepared. Any possible prejudice to the defendant could have been remedied later in the Court of Common Pleas where the Defendant or his substitute counsel could move for a remand to the District Justice for a new preliminary hearing or could file a motion for habeas corpus. Also, nothing actually prevented the Commonwealth from proceeding with the preliminary hearing for Defendant Irwin whose attorney from the Public Defender's Office was assigned and would not change. The substitution of an attorney clearly would be only in the case of Defendant Keefer. In light of Ms. Feronti's firm determination that all the preliminary hearings be consolidated, a waiver would have been appropriate, but it was not considered. Also, in her allegation that the trial court delayed the preliminary hearing by not agreeing to have stand-by counsel available, the Commonwealth is attributing the delay to the Court. The law in Pennsylvania is clear that delays by the court are to be attributed to the Commonwealth and are not excludable. *See Aaron*, 804 A.2d 39.

The Commonwealth persists in its allegations regarding the Court's error in not providing stand-by counsel when it states that the Court erred by failing to exclude the period of time from January 27, 2003 to March 19, 2003. (Paragraph B(f) Concise Statement of Matters Complained of on Appeal). The discussion set forth above in response to the Commonwealth's allegations in Paragraph B(e) are pertinent also on this issue. In addition, there was no need for the Commonwealth to accept the delay from

January 27, 2003 to March 19, 2003 for a rescheduled preliminary hearing. Because of the Commonwealth's duty of due diligence to each separate defendant, if it could not arrange a consolidated preliminary hearing, it could have scheduled separate preliminary hearings to accommodate the various defendants and their counsel. In fact, the District Justice testified that she could have set an earlier date for which only one of the defendant's counsel could not be present, that is Joan Fairchild, Esquire for Defendant Mineard. (Tr. at 96) Because of the Commonwealth's demand that all hearings be scheduled together, the District Justice could not find a date prior to March 19, 2003 which accommodated everyone. It should also be noted that although the Assistant District Attorney argued that her reason for consolidation was to prevent victims from making numerous trips to Warren County to testify (Tr. at 27:24; 32:9), she did not have any of the victims present to testify at either scheduled preliminary hearing (Tr. at 56:6-57:4). Nevertheless, if any delay was due to the actions of any court, including that of a District Justice, that period of delay is attributable to the Commonwealth. *See Aaron*, 809 A.2d 39.

The Commonwealth's contention as to delays caused by the schedule of the Court of Common Pleas and by the time taken by the Court to rule on a Motion for Consolidation as contained in Paragraph B(g)(h)(i) and Paragraph C of Commonwealth's Concise Statement of Matters Complained of on Appeal all disregard the clear holding of the Superior Court in *Comm. v. Aaron*. The Court in *Aaron* stated that "the record of the hearing on Appellant's Motion to Dismiss the charges indicates that the Commonwealth made no request to schedule Appellant's case prior to the Rule 1100 run date." In the instant case, there is no evidence that the Commonwealth filed a motion for an arraignment date other than on the regular arraignment day which had been scheduled on the Court calendar prior to the commencement of the calendar year. Rule 300 of the Local Rules of Court for Warren/Forest Counties references that the arraignment "shall be the first available arraignment date at least 20 days after the preliminary

hearing is held or waived." Rule L300(1)(a) The Commonwealth could have complied with said Rule, by requesting an arraignment for the five defendants involved at anytime after April 8, 2003. The next scheduled jury selection date was July 14, 2003 (Tr. at 104: 21) and there is no minimum number of days that are required to separate the date for arraignment from the date for the settlement conference. Rule L300(1)(b) (There is a maximum number of days requiring that a settlement conference be held not later than 45 days after the arraignment.) If the Commonwealth had moved for a special arraignment and settlement conference, the case could have been ready for calendar call on June 30, 2003 and trial on July 14, 2003. The Commonwealth did not take any action to accelerate the usual court schedule. The holding of *Comm. v. Aaron* resolved any questions of delays created by a pre-set court schedule.

For the foregoing reasons, this Court entered its Order of June 27, 2003. No further Opinion shall issue.

BY THE COURT

WILLIAM F. MORGAN, J.